

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

MetroPCS, a brand of T-Mobile, Inc.,
Plaintiff
v.
A2Z Connection, LLC, et al.,
Defendants

2:15-cv-01412-JAD-CWH

Order Granting in Part Motion for Default Judgment and Permanent Injunction

[ECF No. 40]

10 MetroPCS sues A2Z Connection, LLC, A2Z, LLC (“A2Z”), and three of A2Z’s agents, Amir,
11 Asim, and Seher Qureshi, for trademark infringement and related claims and seeks monetary
12 damages, recovery of defendants’ inventory of MetroPCS phones and products bearing MetroPCS’s
13 marks, and permanent injunctive relief.¹ Defaults have been entered against all defendants.²
14 Because defendants refuse to defend against MetroPCS’s allegations—despite being served with
15 process³—MetroPCS asks me to enter default judgment against each of them and to permanently
16 enjoin them from engaging in the unlawful activities described in its complaint.⁴ Having weighed
17 the *Eitel* factors, I grant MetroPCS’s motion for default judgment in part and award MetroPCS a
18 permanent injunction.

Background

20 T-Mobile sells wireless phones under the brand MetroPCS for use with MetroPCS service on
21 the T-Mobile wireless network.⁵ These phones are sold at prices below wholesale cost to MetroPCS

24 ||¹ ECF No. 1.

²⁵ ¶² ECF Nos. 23, 31, 33.

²⁶ ¶³ ECF Nos. 11, 24–26.

²⁷ ¶⁴ ECF No. 1; ECF No 40-5 at ¶ 2, a-i.

²⁸ ¶ 5 ECF No. 1 at ¶ 1.

1 so that the phones are more widely accessible to customers.⁶ MetroPCS alleges that defendants and
2 their co-conspirators are engaged in an unlawful scheme to illegally acquire the phones through
3 various methods, “unlocking” the phones so they will operate on other wireless networks but not on
4 the MetroPCS network, and reselling the unlocked MetroPCS phones to people other than MetroPCS
5 customers.⁷ MetroPCS alleges that defendants obtain the phones through theft or fraud and divert
6 them to other markets where phones are not subsidized, thereby converting MetroPCS’s investment
7 dollars into profits for defendants and their co-conspirators.⁸ MetroPCS also asserts that defendants’
8 actions have resulted in a shortages of available MetroPCS phones, thereby substantially harming its
9 relationship with retailers, dealers, and consumers because it is not able to supply retailers and
10 dealers with a sufficient number of phones to satisfy the high customer demand.⁹ MetroPCS
11 therefore “seeks to recover damages from the harm caused by defendants’ [phone] theft and
12 trafficking scheme, and to obtain an injunction prohibiting defendants from continuing to perpetuate
13 the scheme.”¹⁰

14 After the defendants all failed to appear or defend against MetroPCS’s allegations, the Clerk
15 of Court entered default against all of the defendants, and MetroPCS moved for default judgment
16 against them.¹¹ I denied MetroPCS’s motion without prejudice because it failed to address the *Eitel*
17 *v. McCool* factors.¹² MetroPCS renewed its motion,¹³ which I now address.

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20 ⁶ *Id.*

21 ⁷ *Id.* at ¶¶ 1–2.

22 ⁸ *Id.* at ¶ 3.

23 ⁹ ECF No. 1 at ¶¶ 44, 62–63; ECF No. 40 at 26.

24 ¹⁰ *Id.* at ¶ 5.

25 ¹¹ ECF No. 35.

26 ¹² ECF No. 36.

27 ¹³ ECF No. 40.

Discussion

2 Federal Rule of Civil Procedure 55(b)(2) permits a plaintiff to obtain default judgment if the clerk
3 previously entered default based on a defendant's failure to defend. After entry of default, the
4 complaint's factual allegations are taken as true, except those relating to damages.¹⁴ “[N]ecessary
5 facts not contained in the pleadings, and claims [that] are legally insufficient, are not established by
6 default.”¹⁵ The court has the power to require a plaintiff to provide additional proof of facts or
7 damages in order to ensure that the requested relief is appropriate.¹⁶ Whether to grant a motion for
8 default judgment lies within my discretion,¹⁷ which is guided by the seven factors outlined by the
9 Ninth Circuit in *Eitel v. McCool*:

10 (1) the possibility of prejudice to the plaintiff; (2) the merits of plaintiff's
11 substantive claim; (3) sufficiency of the complaint; (4) the sum of money at stake
12 in the action; (5) the possibility of a dispute concerning material facts; (6)
whether the default was due to excusable neglect; and (7) the strong policy
underlying the Federal Rules of Civil Procedure favoring decisions on the
merits.¹⁸

14 A default judgment is generally disfavored because “[c]ases should be decided upon their merits
15 whenever reasonably possible.”¹⁹

16 | A. Analyzing the *Eitel* factors

1. Possibility of prejudice to MetroPCS

¹⁸ The first *Eitel* factor weighs in favor of granting default judgment against defendants.

19 MetroPCS pursued its claims to recover the damages that it sustained as a result of defendants' acts

¹⁴ *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917–18 (9th Cir. 1987) (per curiam); Fed. R. Civ. P. 8(b)(6) (“An allegation—other than one relating to the amount of damages—is admitted if a responsive pleading is required and the allegation is not denied.”).

²³ ¹⁵ *Cripps v. Life Ins. Co. Of N. America*, 980 F.2d 1261, 1267 (9th Cir. 1992).

²⁴ || ¹⁶ See Fed. R. Civ. P. 55(b)(2).

²⁵ ¹⁷ *Eitel v. McCool*, 782 F.2d 1470, 1471 (9th Cir. 1986).

26 | ¹⁸ *Id.* at 1471–72.

27 ||¹⁹ *Id.* at 1472.

1 and to prevent defendants from perpetuating their scheme and causing further reputational and
2 financial harm to MetroPCS.²⁰ Defendants failed to participate in this case despite MetroPCS's
3 attempts to include them. The defendants' refusal to participate compounds MetroPCS's injuries by
4 requiring it to expend additional resources to further litigate uncontested issues. Without a judgment
5 against defendants, MetroPCS has no other recourse to recover for the injuries that it has sustained.

2. Substantive merits and sufficiency of the claims

The second and third *Eitel* factors require MetroPCS to demonstrate that it has stated claims on which it may recover.²¹ Among others, MetroPCS asserts claims against defendants for federal trademark infringement in violation of § 32(1) of the Lanham Act (15 U.S.C. § 1114), federal common law trademark infringement, false advertising in violation of § 43(a) of the Lanham Act (15 U.S.C. §§ 1125(a)(1)(A) and (B)), contributory trademark infringement, and common law unfair competition.²² The complaint sufficiently sets forth these claims.

13 MetroPCS alleges that it has the right to use and enforce the MetroPCS marks on and in
14 connection with its products and services.²³ MetroPCS also alleges that defendants' "conspiracy to
15 sell and offer for sale materially-different MetroPCS [phones], removed from packaging[,] . . .
16 devoid of the manufacturer's warranty," and that have been altered so as to no longer work on the
17 MetroPCS network, "has caused, and will further cause, a likelihood of confusion, mistake, and
18 deception as to the source or origin of defendants' infringing products, and the relationship between
19 [MetroPCS] and defendant[s]."²⁴ MetroPCS asserts that defendants' actions were intentional,
20 malicious, willful, and done in bad faith and have caused MetroPCS substantial harm and,
21 despite being sued here, defendants are still actively engaged in their scheme as evidenced by their

²⁰ ECF No. 40 at 16.

²⁴ ²¹ See *Danning v. Lavine*, 572 F.2d 1386, 1388 (9th Cir. 1978).

²⁵ ²² See *id.* at 16, 32–37 (counts 1, 11–13).

²⁶ ¶ 23 ECF No. 1 at ¶ 30–32.

²⁷ ¶²⁴ ECF No. 40 at 10.

1 recent attempts to sell fraudulently obtained MetroPCS phones to MetroPCS's private
2 investigators.²⁵

3 "To prevail on a claim of trademark infringement under the Lanham Act, 15 U.S.C. § 1114, a
4 party 'must prove: (1) that it has a protectable ownership interest in the mark; and (2) that the
5 defendant's use of the mark is likely to cause consumer confusion.'"²⁶ "While actual damages are not
6 a required element for establishing trademark infringement, possible remedies include injunctive
7 relief, award of defendant's profits, the costs of the action, and attorneys' fees."²⁷ The same test
8 applies to common law trademark infringement and unfair competition claims.²⁸ Contributory
9 infringement extends to those who knowingly play a significant role in accompanying the unlawful
10 purpose.²⁹

11 Accepting MetroPCS's well-pled factual allegations as true, as I must in deciding a motion
12 for default judgment, I find that MetroPCS has pled and proved its trademark infringement,
13 contributory infringement, and common law unfair competition claims against defendants. Because
14 these claims allow MetroPCS to recover the complete damages and injunctive relief that it seeks, I
15 do not address the merits of MetroPCS's remaining claims and limit my analysis of the remaining
16 *Eitel* factors to only these claims.

17 **3. Amount at stake**

18 The fourth *Eitel* factor requires me to "assess whether the recovery sought is proportional to
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22 ²⁵ ECF Nos. 1 at ¶ 54; 40 at 8; 40-2 at ¶¶ 5, 9.

23 ²⁶ *Network Automation, Inc. v. Advanced Sys. Concepts, Inc.*, 638 F.3d 1137, 1144 (9th Cir. 2011).

24 ²⁷ *Herb Reed Enterprises, Inc. v. Bennett*, 2011 WL 2607079 at *2 (D. Nev. June 30, 2011) (citing 15
25 U.S.C. §§ 1114(1), 1116, 1117(a)).

26 ²⁸ See, e.g., *New West Corp. v. NYM Co. of Ca., Inc.*, 595 F.2d 1194, 1201 (9th Cir. 1979) (finding that
likelihood of confusion is the test regardless of the violation).

27 ²⁹ *Perfect 10, Inc. v. Visa Intern. Serv. Ass'n*, 494 F.3d 788, 795 (9th Cir. 2007).

1 the harm caused by defendants' conduct.”³⁰ The Lanham Act provides that when a trademark
2 violation occurs under 15 U.S.C. § 1125(a), (c), or (d), a plaintiff is entitled,

3 subject to the provisions of sections 1111 and 1114 of this title, and subject to the
4 principles of equity, to recover (1) defendant's profits, (2) any damages sustained by
5 the plaintiff, and (3) the costs of the action. The court shall assess such profits and
6 damages or cause the same to be assessed under its direction. In assessing profits the
7 plaintiff shall be required to prove defendant's sales only; defendant must prove all
elements of cost or deduction claimed If the court find[s] that the amount of the
recovery based on profits is either inadequate or excessive [it] may in its discretion
enter judgment for such sum as [it] find[s] just, according to the circumstances of the
case. Such sum . . . constitute[s] compensation and not a penalty.³¹

8 When determining whether to award a plaintiff attorney's fees, “a case is considered exceptional
9 ‘when the infringement is malicious, fraudulent, deliberate, or willful.’”³² “Egregious conduct is not
10 required[,] . . . nor is bad faith.”³³ When determining the amount of damages to award, if any, I have
11 “discretion to increase the profit award above the net profits proven” if I find the amount of the
12 recovery “inadequate.”³⁴ I “must apply ‘principles of equity’ and ensure that the defendant ‘may not
13 retain the fruits, if any, of unauthorized trademark use or continue that use,’” while also ensuring that
14 “plaintiff is not . . . [given] a windfall.”³⁵

15 “The Lanham Act allows an award of profits only to the extent the award ‘shall constitute
16 compensation and not a penalty.’”³⁶ “The district court ought to tread lightly when deciding whether
17 to award increased profits, because granting an increase could easily transfigure an

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19 ³⁰ *Landstar Ranger, Inc. v. Parth Enterprises, Inc.*, 725 F. Supp. 2d 916, 921 (C.D. Cal. 2010) (citation
omitted).

20 ³¹ *Fifty-Six Hope Road Music, Ltd. v. A.V.E.L.A., Inc.*, 778 F.3d 1059, 1077 (9th Cir. 2015) (quoting 15
U.S.C. § 1117(a)).

22 ³² *Id.* at 1078 (quoting *Gracie v. Gracie*, 217 F.3d 1060, 1068 (9th Cir. 2000)).

23 ³³ *Id.* (internal quotations omitted).

24 ³⁴ *Id.* (citing 15 U.S.C. § 1117(a)).

25 ³⁵ *Id.* (quoting 15 U.S.C. § 1117(a); *Bandag, Inc. v. Al Bolster's Tire Stores, Inc.*, 750 F.2d 903, 918
(9th Cir. 1984)).

26 ³⁶ *TrafficSchool.com, Inc. v. Edriver Inc.*, 653 F.3d 820, 831 (9th Cir. 2011) (quoting 15 U.S.C. §
1117(a)).

1 otherwise-acceptable compensatory award into an impermissible punitive measure.”³⁷

2 MetroPCS seeks \$2,403,660 in damages, \$28,037.05 in attorney’s fees and costs, and
3 \$6,643.75 in “investigation fees.”³⁸ In calculating its damages, MetroPCS has shown through the
4 sworn declaration of Josh Neil, its Vice President of Field Operations and Financial Control, that as
5 of the date that the complaint was filed, defendants have provided MetroPCS’s investigators with
6 written sales offers for 1,138 MetroPCS phones.³⁹ MetroPCS asserts that it has an average
7 investment of \$155 in each phone and that each phone sold to a MetroPCS customer will generate
8 net revenues of \$524.⁴⁰ Thus, each phone that defendant sells to a non-MetroPCS customer results in
9 \$679 in damages (\$155+\$524=\$679) to MetroPCS.⁴¹ MetroPCS multiplies the 1,138 phones that
10 defendants have attempted to sell to its investigators by the \$679 in damages it sustained on each
11 phone, to arrive at a total damage amount of \$801,220.00.⁴² MetroPCS then seeks to triple that
12 amount to \$2,403,660 under the Lanham Act’s treble damages provision.⁴³

13 I conclude that the base amount of damages that MetroPCS seeks (\$801,220) is a reasonable
14 compensatory award when balanced against defendants’ conduct and in light of the fact that
15 MetroPCS seeks damages only for the phones that defendants actually tried to sell to MetroPCS’s
16 private investigators, when defendants likely procured and sold many more MetroPCS phones to
17 other customers, further compounding MetroPCS’s damages beyond the scope of what MetroPCS
18 seeks here. However, MetroPCS has failed to establish its claim for treble damages.

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21 ³⁷ *Fifty-Six Hope Road Music, Ltd.*, 778 F.3d at 1077 (citing *Skydive Ariz., Inc. v. Quattrocchi*, 673 F.3d
1105, 1114–15 (9th Cir. 2012)).

22 ³⁸ ECF No. 40 at 28–29.

23 ³⁹ ECF No. 40 at 20; ECF No. 40-3 at 3–4.

24 ⁴⁰ *Id.*

25 ⁴¹ *Id.*

26 ⁴² *Id.*

27 ⁴³ *Id.* (citing 15 U.S.C. § 1117(a)).

In support of its prayer for treble damages, MetroPCS asserts that defendants knowingly, willfully, and deliberately engaged in their fraudulent scheme, and continue to engage in the scheme, as evidenced by defendants' offer to sell MetroPCS's private investigators MetroPCS phones after this case was initiated and after all defendants had been served with a copy of the summons and complaint. I find that these facts make this an exceptional case, warranting the award of attorney's and investigation fees that MetroPCS seeks. I also find that MetroPCS clearly proved these fee amounts by submitting copies of the detailed billing statements it received from its attorneys and its investigator, which I reviewed and conclude are reasonable.⁴⁴ I also find that these facts support granting MetroPCS's motion insofar as it seeks to recover all phones bearing the MetroPCS mark from defendants so they can no longer harm MetroPCS by selling their phones. But I do not find that an award of treble damages is supported by the facts in this case; rather, treble damages would transfigure MetroPCS's otherwise-acceptable compensatory award into an impermissible punitive measure. MetroPCS's facts and evidence do not suggest otherwise. By failing to appear and defend against MetroPCS's claims, defendants have failed to prove any deductions from the amounts MetroPCS claims.

16 Accordingly, I find that the \$801,220 in damages, \$28,037.05 in attorney's fees and costs,
17 and \$6,643.75 in investigation fees that MetroPCS seeks, for a total of \$835,900.80, sufficiently
18 compensates MetroPCS for its damages. I also find that the return of all MetroPCS phones in
19 defendants' possession is reasonable to prevent any further unauthorized use of MetroPCS's
20 trademark by defendants.

4. Possibility of dispute

Under the next *Eitel* factor, I consider the possibility that material facts are disputed. MetroPCS has adequately alleged its trademark infringement, contributory infringement, and common law unfair competition claims against defendants. When defendants failed to appear, they admitted all of the non-conclusory material facts alleged in MetroPCS's complaint. Because those

⁴⁴ See ECF No. 40-1 at 9–32; ECF No. 40-4 at 2–5.

1 facts are presumed true and defendants have failed to oppose the motion, no factual disputes exist
2 that would preclude the entry of default judgment against defendants.

3 **5. *Possibility of excusable neglect***

4 The sixth *Eitel* factor requires me to consider whether defendants' default may have resulted
5 from excusable neglect. After the defendants were served with process,⁴⁵ they failed to make an
6 appearance in this case. Over a year and a half has passed since the Clerk entered default against
7 each defendant,⁴⁶ and no effort has been made by any of them to set aside the defaults. It is thus
8 unlikely that defendants' defaults are the product of excusable neglect.

9 **6. *Policy for deciding cases on the merits***

10 Despite being served with a demand letter and process, defendants have not responded to
11 MetroPCS's complaint. Their refusal renders a decision on the merits "impractical, if not
12 impossible."⁴⁷ Entry of default judgment is therefore appropriate. I find that defendants' trademark
13 infringement, contributory infringement, and common law unfair competition violations justify an
14 award in the amount of \$835,900.80, and I direct the Clerk of Court to enter judgment in this amount
15 against defendants and in favor of MetroPCS. I also order defendants to return all phones in their
16 possession bearing the MetroPCS mark to MetroPCS.

17 **B. Permanent injunction**

18 "Avoiding harm to consumers is an important interest that is independent of the senior user's
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21 ⁴⁵ See ECF No. 11 (Amir Qureshi was served with the summons and complaint on August 4, 2015);
22 ECF No. 24 (A2Z Connection, LLC was served with the summons and complaint on August 6, 2015);
23 See ECF Nos. 25, 26 (A2Z, LLC and Asim Qureshi were served with the summons and complaint on
August 30, 2015); and ECF No. 27 (Seher Qureshi was served with the summons and complaint on
October 22, 2015).

24 ⁴⁶ See ECF No. 23 (clerks entry of default against Amir Qureshi on September 2, 2015); ECF No. 31
25 (clerks entry of default against A2Z Connection, LLC; A2Z, LLC; and Asim Qureshi on November 12,
2015); and ECF No. 33 (clerks entry of default against Seher Qureshi on November 17, 2015).

26 ⁴⁷ See *PepsiCo, Inc. v. Cal. Sec. Cans*, 238 F. Supp. 2d 1172, 1177 (C.D. Cal. 2002) (citing *Columbia
27 Pictures Tele., Inc. v. Krypton Broad. of Birmingham, Inc.*, 259 F.3d 1186, 1194 (9th Cir. 2001)).

1 interest in protecting its business.”⁴⁸ Although likelihood of confusion is a sufficient ground for
2 issuance of an injunction,⁴⁹ a “[p]laintiff is not automatically entitled to injunction under [the]
3 Lanham Act simply because it proved its affirmative trademark claims.”⁵⁰ To obtain a permanent
4 injunction, a plaintiff must demonstrate that: (1) it has suffered an irreparable injury; (2) remedies
5 available at law, such as monetary damages, are inadequate to compensate for that injury; (3)
6 considering the balance of hardships between the plaintiff and defendant, a remedy in equity is
7 warranted; and (4) the public interest would not be disserved by a permanent injunction.⁵¹

8 Defendants have willfully infringed upon MetroPCS’s trademark and they continue to do so,
9 as evidenced by their recent attempts to solicit MetroPCS’s private investigators to purchase new
10 MetroPCS phones from them. MetroPCS has also suffered irreparable injury in the form of lost
11 business and harm to its reputation when customers purchase the unlocked MetroPCS phones from
12 defendants, only to learn that the modified phones no longer work on MetroPCS’s network. This
13 reputational harm to MetroPCS is not quantifiable as monetary damages. After balancing the
14 hardships between MetroPCS and defendants, I find that they weigh strongly in MetroPCS’s favor
15 because defendants have proven their willingness to infringe on MetroPCS’s trademark even after
16 being served with process in this suit. Thus, if a permanent injunction is not issued, MetroPCS will
17 be forced to repeatedly file suit against defendants to prevent their conduct. I also find that the
18 public interest would not be disserved by issuing a permanent injunction because the injunction
19 would eliminate marketplace confusion by removing “unlocked” MetroPCS phones from the
20 marketplace that do not work on the MetroPCS network. Accordingly, I grant MetroPCS’s motion

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⁴⁸ *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 905 (9th Cir. 2002).

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⁴⁹ *Pacific Telesis Group v. International Telesis Communications*, 994 F.2d 1364 (9th Cir. 1993).

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⁵⁰ *Westinghouse Elec. Corp. v. General Circuit Breaker & Elec. Supply Inc.*, 106 F.3d 894 (9th Cir. 1997).

⁵¹ *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006).

1 for a permanent injunction.⁵²

2 Defendants will be permanently enjoined from:

- 3 • accessing PCS's or T-Mobile's computer networks either directly or indirectly;
- 4 • using marks owned or used by MetroPCS now or in the future, or marks that are likely to
cause confusion with MetroPCS marks without MetroPCS's prior written authorization; and
- 5 • holding themselves out as being associated with, employed by or on behalf of, or acting as an
agent, representative, or authorized partner of MetroPCS without MetroPCS's prior written
authorization.⁵³

9 Conclusion

10 Accordingly, with good cause appearing and no reason to delay, IT IS HEREBY ORDERED,
11 ADJUDGED, AND DECREED that MetroPCS's **motion for default judgment and permanent
12 injunction [ECF No. 40] is GRANTED in part**: I award MetroPCS \$801,220 in monetary
13 damages, \$28,037.05 in attorney's fees and costs, and \$6,643.75 in investigative costs, for a total of
14 \$835,900.80. Defendants must return to MetroPCS all phones in their possession bearing the
15 MetroPCS mark. Defendants are permanently enjoined from: accessing T-Mobile's networks either
16 directly or indirectly; using marks owned or used by MetroPCS now or in the future, or marks that
17 are likely to cause confusion with MetroPCS marks without MetroPCS's prior written authorization;
18 and holding themselves out as being associated with, employed by or on behalf of, or acting as an
19 agent, representative, or authorized partner of MetroPCS without MetroPCS's prior written
20 authorization.

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24 ⁵² See *Quiksilver, Inc. v. Kymsta Corp.*, 360 F. App'x. 886, 889 (9th Cir. 2009) (holding that a permanent
25 injunction is proper when the harm will only continue); see also *eBay Inc.*, 547 U.S. 388 (finding a four
part test including the inability to compensate is necessary to issue a permanent injunction).

26 ⁵³ The court considered the other categories of injunctive relief that plaintiff demanded but finds all other
27 categories overly broad or too vague to enforce.

The Clerk of Court is directed to enter judgment in favor of MetroPCS and against defendants in the total amount of \$835,900.80 and **CLOSE** this case.

DATED June 12, 2017.

Jennifer A. Dorsey
United States District Judge